IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-208

AMALGAMATED TRANSIT UNION, LOCAL 788,
Petitioner,

v.

BEN ALLEN, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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PRAYER

Petitioner, Defendant-Appellant below, prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered on May 9, 1977, and that said judgment and opinion be vacated and summarily reversed.

OPINIONS BELOW

The opinion of the Eighth Circuit Court of Appeals is reported at — F.2d —, 14 FEP 1494 (8th Cir. 1977) and is reprinted in the Appendix at p. A-1. The unreported Order of

the Court of Appeals denying Petitioner's Suggestions for Reconsideration is reprinted in the Appendix at p. A-18.

The opinion of the United States District Court for the Eastern District of Missouri is reported at 415 F.Supp. 662 (E.D. Mo. 1976) and is reprinted in the Appendix at p. A-20.

JURISDICTION

The judgment of the Court of Appeals was entered on May 9, 1977. Jurisdiction is invoked here under 28 U.S.C. § 1254(1).

QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals erred in holding that Respondents' claims constituted "continuing discrimination" and were therefore not time-barred, particularly in view of the subsequent decision of this Court in *United Air Lines, Inc. v. Evans*, No. 76-333, 45 U.S.L.W. 4566, decided May 31, 1977, holding that the operation of a seniority system is not unlawful under Title VII of the Civil Rights Act of 1964 even though it perpetuates post-Act discrimination that was not the subject of a timely charge by the discriminatee.

STATUTORY PROVISIONS INVOLVED

U.S.C., Title 42, Section 2000e-5(e)
Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency

(e) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment

practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

U.S.C., Title 42, Section 1981
Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Revised Statutes of Missouri, Section 516.120
What actions within five years

Within five years:

(1) All actions upon contracts, obligations or liabilities, express or implied, except those mentioned in section 516.110,

and except upon judgments or decrees of a court of record, and except where a different time is herein limited;

(2) An action upon a liability created by a statute other than a penalty or forfeiture;

(3) An action for trespass on real estate;

(4) An action for taking, detaining or injuring any goods or chattels, including actions for the recovery of specific personal property, or for any other injury to the person or rights of another, not arising on contract and not herein otherwise enumerated;

(5) An action for relief on the ground of fraud, the cause of action in such case to be deemed not to have accrued until the discovery by the aggrieved party, at any time within ten years, of the facts constituting the fraud. (R.S.1939, § 1014)

STATEMENT OF THE CASE

Respondents (15 individuals) filed this cause on July 5, 1974, asserting jurisdiction in the United States District Court, Eastern District of Missouri, under U.S.C., Title 28, Section 1331. The District Court found for Respondents in their claims based on racial discrimination under U.S.C., Title 42, Sections 1981 and 2000(e) ("Section 1981" and "Title VII" respectively). The Eighth Circuit Court of Appeals affirmed.

Petitioner asserted at the outset, and throughout this litigation, that Respondents' claims were time-barred under the applicable statutes of limitation, namely, the five-year statute of limitation provided in § 516.120 Revised Statutes of Missouri (1969), being most analogous to the Section 1981 claims, and the 300-day[1] limitation under Section 2000e-5(e) of Title VII.

[1] Under the predecessor statute, U.S.C., Title 42, Section 2000e-5(d), a 210-day limit applied, rather than the present 300-day limit. Under either statute, the result would be the same in the case.

The facts pertinent to the statute of limitations issues raised here are as follows. Beginning in 1965, Respondents were employed by the Bi-State Development Agency of the Missouri-Illinois Metropolitan District, Transit Division ("Bi-State"), which operates and maintains bus transportation services in the metropolitan St. Louis area. The Petitioner (the "Union") is a labor organization which acts as a collective bargaining representative for Bi-State's bus drivers and maintenance employees. At the time of trial, approximately 40 percent of the Union membership was black. Prior to commencing employment with Bi-State as new employees and becoming members of the Union, Respondents operated or maintained elongated automobiles as a form of taxi service for Consolidated Service Car Company ("Consolidated"), which was liquidated in 1965.

The gravamen of Respondents' case is that they, as black employees of Bi-State and members of the Union, were treated differently at the time of their employment in 1965 and 1966, from individuals who became employees of Bi-State and members of the Union in 1963, by virtue of the merger of 15 separate transit companies to form the Bi-State system. Specifically, Respondents complained about the payment of a $100.00 Union initiation fee, and their placement at the end of the Union seniority list, without credit for prior service with Consolidated, as compared to a waiver of the initiation fee for the 1963 merger employees, and the dove-tailing of those employees on the Union seniority list.

Respondents did not complain to the Union until 1969 about alleged racial discrimination in treating them differently as to seniority and initiation fees than the manner in which merged employees were treated in 1963.

After various unsuccessful attempts to conciliate their complaints against the Union, two of the Respondents filed charges with the Equal Employment Opportunity Commission on March

11, 1971. On June 14, 1974, the EEOC issued right to sue letters and this action was commenced under Title VII and Section 1981 as to the Respondents who had filed charges. None of the other Respondents filed EEOC charges and their claims were joined in the same suit, but under Section 1981.

The Court of Appeals held that all Respondents were to be treated as a class without the necessity of all "class members" pursuing their administrative remedy with the EEOC. That Court further held that under Title VII and Section 1981, all Respondents were entitled to seniority for their prior service with Consolidated, back pay under Section 1981 limited to the applicable five-year Missouri statute of limitations, and restitution of the $100.00 initiation fee paid at the time Respondents joined the Union.

The issue presented here turns on the holding of the Court of Appeals that the alleged discrimination against Respondents was of a "continuing" nature, and that therefore the applicable statutes of limitation did not bar a finding of discrimination, even though the acts giving rise to Respondents' claims occurred in 1965 or 1966 when they became members of the Union, were end-tailed on the Union seniority list, and paid the $100.00. These alleged acts of discrimination occurred approximately five years before the filing of charges under Title VII, and approximately eight years before the filing of suit.

ARGUMENT AND REASONS RELIED ON FOR ALLOWING THE WRIT

The Court of Appeals ruled prior to the decision of this Court in *United Air Lines, Inc. v. Evans*, No. 76-333, 45 U.S. L.W. 4566, decided May 31, 1977. Petitioner asserts that the holding in *Evans*, supra, is clearly dispositive of the question presented for review here. After the Court of Appeals denied Petitioner's suggestions to reconsider its opinion based on *Evans*, supra, the granting of this writ remained as the only avenue for applying the law as now clarified by *Evans*, supra, to the instant case.

The Court of Appeals, in deciding the crucial statute of limitations question, relied on the so-called "continuing discrimination" theory. According to that theory, which the Court of Appeals considered "too well-settled to require further discussion," the statute of limitations does not apply to bar a finding of discrimination, where the purportedly discriminatory act presently affects an employee's status. Therefore, according to the Court of Appeals, the singular, isolated act of placing the Respondents at the end of the Union seniority list in 1965 or 1966, was subject to an otherwise untimely change under Title VII, and suit under Section 1981, merely because Respondents asserted that they continued to feel the effects of that placement.

The Court of Appeals relied primarily on *Franks v. Bowman*, 424 U.S. 747 (1976), *Evans v. United Air Lines, Inc.*, 534 F.2d 1247 (7th Cir. 1976), and *Developments in the Law —Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109 (1971) in support of its holding. The later definitive ruling of this Court in *Evans*, supra, clearly confronts the issue presented here, and affords precise reasoning for reversing the Court of Appeals.

In *Evans*, supra, plaintiff sought retroactive seniority credit based on acts which occurred outside the time limitations for

filing a charge under Title VII. Her theory, which is precisely the same as that advanced by Respondents here, is that the present effects of past illegal acts which perpetuate the consequences of forbidden discrimination, are equivalent to present, continuing violations of Title VII, and therefore, a charge is timely so long as those consequences continue.

In the instant case the purportedly discriminatory acts occurred in 1965 or 1966 when Respondents were end-tailed on the Union seniority list and not given credit for prior service with Consolidated. This is analogous to the facts in *Evans*, supra, where this Court stated:

> Respondent cannot rely for jurisdiction on the single act of failing to assign her seniority credit for her prior service at the time she was rehired, for she filed her discrimination charge with the Equal Employment Opportunity Commission . . . after . . . the applicable time limit. (fn. 9)

This reasoning applies to Respondents here with equal force and effect. No charge of discrimination was filed with the EEOC until many years after the Union placed the Respondents on the seniority list without credit for prior service. Accordingly, as to both Respondent's Title VII and Section 1981 claims, any discriminatory acts not made the subject of timely charges or timely suit have no "present legal consequences," because the applicable statutes of limitation had run. *Evans*, supra, pg. 4567.

The reliance by the Court of Appeals on *Franks v. Bowman*, supra, was obviously misplaced as explained by this Court in *Evans*, supra. In *Franks*, supra, this Court dealt with remedies and relief where the issue of timeliness had already been decided. Therefore, *Franks*, supra, has no bearing here where the issue of timeliness remains the primary subject of dispute.

In the lower courts Respondents argued that Petitioner's continued failures to grant retroactive seniority constituted a

basis for a finding of discrimination. This argument was also put to rest by this Court's opinion in *Evans*, supra. Thus, Petitioner's "continued adherence" to its position as to placement of Respondents on the Union seniority list is not illegal if the Title VII claims were not asserted in a timely manner. (See, *Evans*, fn. 13).

The decision of the Court of Appeals in this case runs directly afoul of this Court's holding in *Evans*, supra. As stated in *Teamsters v. U. S.*, — U.S. —, 14 FEP Cases 1514 (1977) (fn. 30):

> Evans holds that the operation of a seniority system is not unlawful under Title VII even though it perpetuates post-Act discrimination that has not been the subject of a timely charge by the discriminatee.

Petitioner respectfully submits that the Court of Appeals did that which this Court later forbade in *Evans*, supra, namely, allowing a past act, having no *present* legal significance, to rejuvenate an otherwise time-barred claim. It is clear that allowing the Court of Appeals' decision to stand contravenes the mandate of the statutes of limitation under both Section 1981 and Title VII.

CONCLUSION

For the reasons stated above, this Petition for Writ of Certiorari should be granted, and the decision of the Court of Appeals vacated and summarily reversed.

Respectfully submitted,

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APPENDIX

APPENDIX I

United States Court of Appeals for the Eighth Circuit

Nos. 76-1542 and 76-1551

Ben Allen; Abraham Bracy; Aaron Rutlin; Alice Cross; Clayton R. Richardson; Frank Smith; Lee Hamlin; Elbert Miller; Mack Hamlin; Claude Riddick; Harold Smith; Earnest Harris; Chester Harris; T. C. Allen; Forest Gay, Appellants, v. Amalgamated Transit Union Local 788, Appellee.	Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: February 16, 1977

Filed: May 9, 1977

Before LAY and WEBSTER, Circuit Judges, and TALBOT SMITH,* Senior District Judge.

LAY, Circuit Judge.

Plaintiffs Ben Allen and Aaron Rutlin, along with 13 other black members of the Amalgamated Transit Union Local 788 (Union), brought suit against the Union alleging racial discrim-

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* Talbot Smith, Senior District Judge, Eastern District of Michigan, sitting by designation.

ination under 42 U.S.C. §§ 1981, 1982, 1983 and 2000e et seq. Plaintiffs alleged that the Union failed to grant them seniority and other incidental rights guaranteed to them under various collective bargaining agreements. A second count alleged that the Union had breached its duty of fair representation under 29 U.S.C. § 185.[1]

The district court, the Honorable H. Kenneth Wangelin, found the defendant guilty of racial discrimination against the plaintiffs in violation of §§ 1981 and 2000e et seq., and ordered, *inter alia:* (1) that each plaintiff be awarded $1,000 punitive damages; (2) that defendant reimburse each plaintiff his $100 initiation fee plus interest thereon from the date of its payment; (3) that plaintiffs be awarded back pay as limited by a five-year statute of limitations, pending a report by special master; (4) that defendant grant Ben Allen and Aaron Rutlin seniority dating from the date of their employment with the Consolidated Service Car Company (CSC); (5) that all other plaintiffs were barred from any relief (including seniority rights) prior to five years from the date of the filing of the complaint (July 5, 1974) under Mo. Rev. Stat. § 516.210 (1969), and that their seniority date should be determined by supplemental order, pending a report from a special master concerning back pay; (6) that defendant pay plaintiffs' attorney a $300 fee; and (7) that defendant be permanently enjoined from any further racial discrimination against plaintiffs.

The Union has appealed the grant of injunctive relief, urging that the trial court erred in finding racial discrimination and in granting any relief to the plaintiffs. The plaintiffs have cross-appealed asserting that the district court erred in limiting remedial relief under the five-year statute of limitations, and in

[1] It is not clear whether the trial court has granted any affirmative relief under 29 U.S.C. § 185. In view of our holding under 42 U.S.C. §§ 1981 and 2000e et seq., we need not pass on the issues presented under the Labor Management Relations Act on this appeal.

awarding an inadequate attorney fee. This court has jurisdiction to review the grant of the injunctive relief under 28 U.S.C. § 1292(a)(1). We affirm in part, and reverse in part.

Facts.

Prior to 1963 several independent companies, including CSC, operated transit facilities in the metropolitan St. Louis area. In 1959 a report prepared for the City of St. Louis and the County of St. Louis (Gilman Report) recommended that all of the companies involved in transit operations be consolidated in three phases: (1) establishment of an area-wide integrated transit system; (2) examination of rapid transit possibilities; and (3) completion of the plan by acquiring the CSC operation and replacing it with bus service. In 1963 fifteen transit companies (excluding CSC) merged into one corporation, Bi-State Development Agency (Bi-State). Bi-State was managed by Transit Services Corporation (TSC) which handled personnel matters, including negotiating collective bargaining agreements.

Most of the employees of the 15 merged companies belonged to various unions. The defendant, which represented about 75 per cent of the merged employees, campaigned so that all the merged employees became members of Local 788. Bi-State, through TSC, recognized the Union without a labor election.

To attract employees in this "organizational drive" the Union agreed to waive the $100 initiation fee for the merged employees. Since it was the policy of the Union to dovetail seniority for the years of prior employment of individuals who brought their work and equipment with them, it was agreed that the seniority of the merged employees would be dovetailed into the two Union seniority rosters (one for maintenance employees and one for drivers). In addition a section in the bargaining agreement provided:

> Seniority of each of the full-time operators covered by this Agreement shall be on a system basis. The years of service of each of the full-time operators with each of their predecessor transit companies shall be counted from date of last employment and given full credit in the seniority roster.

There is no evidence that either the waiver of the initiation fee or the dovetailing provision was presented to the Union "rank and file" membership for approval.

Two years later, in 1965, Bi-State purchased the certificates of convenience issued to CSC, and in November of that year it had the certificates revoked by the city. CSC was then liquidated. Bi-State, through TSC, gave priority in hiring to former CSC employees by waiving any age limitation, any written test and pre-employment investigation. CSC employees only had to appear at the Bi-State employment office, fill out a job application, and pass a physical exam to be employed, and Bi-State hired a total of 34 CSC employees (33 black drivers and 1 white maintenance man) in this manner. The drivers received approximately 30 days of training in areas of routes, transfers, making change and actual bus driving. Following a probationary period all CSC employees joined the Union. Each paid a $100 initiation fee and none was given seniority credit for his prior employment, i.e., seniority was "end-tailed."

The former CSC employees did not complain to Bi-State or the Union about alleged racial discrimination in their treatment as "new employees" in 1965 until at least three years later. They then filed complaints against both the Union and Bi-State with the NAACP and the Missouri Commission on Human Rights. Two, Ben Allen and Aaron Rutlin, eventually filed charges with the Equal Employment Opportunity Commission (EEOC) in March of 1971.

Between 1969 and 1974 Bi-State agreed to grant former CSC employees full seniority credit[2] for their employment with CSC, and paid them back vacation pay as if they had originally been credited for their years with CSC. The Union continued in its refusal to grant former CSC employees full Union seniority.[3] The Union president told the former CSC members that the matter of their seniority would have to be put to a vote before the "rank and file" Union membership. However, he refused to place the matter before the "rank and file," because such action might cost him his office at the next election.

In 1971, a motion was made at a Union meeting for full seniority rights for the former CSC employees. It was seconded, but not entertained by the Union president because of the charges filed by those employees still pending before the city, state and federal commissions.

On August 21, 1972, the EEOC issued a reasonable cause determination that the Union had engaged in unlawful employment practices in violation of Title VII by denying the charging parties (Ben Allen and Aaron Rutlin) their full seniority rights and by charging them the $100 initiation fee. The EEOC decision also stated that the Union made no valid attempt to set into motion the proper processes to obtain the seniority rights demanded by the charging parties.

On June 13, 1974, Ben Allen and Aaron Rutlin were issued notices of right to sue within 90 days. Joined by 13 other former CSC employees they filed this action against the Union on July 5, 1974.

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[2] Seniority for company purposes involved length of vacations, pension benefits, and some future employment benefits.

[3] Seniority for Union purposes involved priority pick of system and division (which route he will drive), vacation time pick, and lay-off.

Discrimination.

On appeal the Union challenges the district court's finding that it discriminated against plaintiffs in violation of §§ 1981 and 2000e et seq. It contends that it had legitimate business reasons for the differences in treatment of the employees involved in the 1963 merger and the plaintiff-employees involved in the purchase of CSC. It urges that CSC was not a transit company and therefore the provision of the bargaining agreements dealing with the grant of full seniority rights of the operators of predecessor transit companies was not applicable; that special training periods were necessary for the service car drivers; and that plaintiffs did not "bring their work and equipment with them" since CSC vehicles were not used by Bi-State. The Union also asserts that prior to the 1963 merger it represented approximately 75 per cent of the employees of the 15 merging transit companies and there existed a substantial continuity of interest to maintain that representation. In contrast it asserts there was no legal obligation for TSC to employ CSC drivers and no continuity of operations entitling the service car drivers to continuous service credit or Union seniority.

The district court, in rejecting these arguments, found they did not rebut the prima facie case of discrimination.[4] We find this decision not clearly erroneous.

The Gilman Report recommendations clearly indicate that CSC was considered an integral part of the then existing transit system. Furthermore, although Bi-State did not continue to operate the CSC vehicles, after the 1965 purchase it added

[4] In actions under 42 U.S.C. § 2000e et seq., a showing of discriminatory impact suffices to establish a prima facie case of discrimination. *See Firefighters Institute for Racial Equality v. St. Louis*, Nos. 76-1507 and 76-1663 (8th Cir., filed Feb. 2, 1977). Once a racially adverse impact is demonstrated, the burden of proof shifts to the employer to prove the job relatedness of his practices. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975).

172 daily round trip bus routes to its system and bought new buses. The district court found this was the equivalent of plaintiffs bringing their work and equipment with them. In addition, there is testimony that some of the smaller front engine and horizontally opposed engine buses used by other merged companies were not used by Bi-State, but that did not affect the treatment of drivers of those buses. Finally, there was evidence that the drivers involved in the 1963 merger also received 30 days of training.

As to the § 1981 claim, the evidence supports a finding that the black plaintiffs were unable to enforce a provision in the collective bargaining agreement which their white counterparts were able to enforce. We accordingly affirm the district court's finding of racial discrimination.

Statute of Limitation.

We agree with the district court that the applicable statute of limitation governing plaintiffs' action under § 1981 is the five-year statute provided in Mo. Rev. Stat. § 516.120 (1969), for breach of written contracts, which is most analogous to the claim asserted here. *See Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975); and *Butler v. Teamsters Local 823*, 514 F.2d 442 (8th Cir. 1975). The Union urges that since the denial of seniority rights and the payment of the initiation fee took place in 1965, the statute bars plaintiffs' claims. However, the district court found that the denial of seniority rights was a continuing discrimination and that the statute had not run. We think this proposition too well-settled to require further discussion. *See Franks v. Bowman Transp. Co., Inc.*, 424 U.S. 747 (1976); *Williams v. Norfolk & W. Ry. Co.*, 530 F.2d 539 (4th Cir. 1975); and *United States v. St. Louis-San Francisco Ry. Co.*, 464 F.2d 301 (8th Cir. 1972) (en banc), *cert. denied sub*

nom., United Transp. Union v. United States, 409 U.S. 1107 (1973).[5]

The Union also contends that the payments of initiation fees were single, isolated acts and that the statute of limitations should bar any claim for repayment. Although we agree that the requirement of the fees is not a continuing wrong since it was not repeated, it was an integral part of the disparate treatment. We find restitution of the initiation fees to be harmonious with the spirit of remedial equitable relief sanctioned by Congress and approved by the Supreme Court in *Franks v. Bowman Transp. Co., Inc., supra.*

Back Pay and Seniority.

After finding that the statute of limitations did not bar the claims, the district court found that it did become relevant in the granting of retroactive relief. The trial court limited the award of back pay to five years and granted full seniority rights

[5] The Fourth Circuit has determined that a cause of action for denial of seniority credit was fully accrued at the original denial and time barred by the applicable statute of limitations. *Kennedy v. Wheeling-Pittsburg Steel Corp.,* 81 L.R.R.M. 2349 (4th Cir. 1972). That case is distinguishable because it involved a lay-off situation. In *Richard v. McDonnell Douglas Corp.,* 469 F.2d 1249 (8th Cir. 1972), this court cites a Harvard Law Review article which states that "if an act originating in the past operates to discriminate against the complainant at the present time, there is a continuous violation." *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964,* 84 Harv. L. Rev. 1109, 1210 (1971). The article suggests that "[t]his might be taken to mean that practically any discrimination is continuing *at least as long as the employment relationship is maintained.*" *Id.* at 1211 (emphasis added).

Recently the Seventh Circuit found that even where there has been a break in the employment nexus, under certain circumstances present practices may rejuvenate earlier discrimination. *See Evans v. United Air Lines, Inc.,* 534 F.2d 1247 (7th Cir. 1976), *cert. granted,* 45 U.S.L.W. 3329 (Nov. 2, 1976).

only to Ben Allen and Aaron Rutlin. We have no difficulty with the court's application of the statute to back pay, but find the court erred in limiting the retroactive seniority rights of the other 13 named plaintiffs.[6]

The injunctive relief sought by plaintiffs is essentially equitable in nature. It seeks to restore to plaintiffs the contractual rights discriminatorily denied to them.[7] Under the circumstances it is settled that a statute of limitations is not applicable and the

[6] Under § 2000e-5(g) back pay is limited to two years from the time of filing a charge with the Equal Employment Opportunities Commission. However, under § 1981 the Missouri five-year statute, Mo. Rev. Stat. § 516.120 (1969), is applicable, and it grants greater relief. It is questionable whether the issue of back pay remains sufficient for the appointment of a master. The Union urges that there is no award due since the company has restored full seniority rights, has made complete restitution as to vaaction time, and there were no lay-offs. Upon remand, the trial court should inquire into this question. It may be that the issue of back pay is completely mooted.

[7] Relief limited to five years would be meaningless. As Mr. Justice Brennan observed in *Franks v. Bowman Transp. Co., Inc.,* 424 U.S. 747 (1976):

> Adequate relief may well be denied in the absence of a seniority remedy slotting the victim in that position in the seniority system that would have been his had he been hired at the time of his application. It can hardly be questioned that ordinarily such relief will be necessary to achieve the "make-whole" purposes of the Act.

Id. at 764-66.

Mr. Justice Brennan made the following observations on seniority:

> Seniority systems and the entitlements conferred by credits earned thereunder are of vast and increasing importance in the economic employment system of this Nation. S. Slichter, J. Healy, and E. Livernash, The Impact of Collective Bargaining on Management, 104-115 (1960). Seniority principles are increasingly used to allocate entitlements to scarce benefits among competing employees ("competitive status" seniority) and to compute noncompetitive benefits earned under the contract of employment ("benefit" seniority). *Ibid.* We have already said about "competitive status" seniority that it "has become of overriding importance, and one of its major functions is to determine who gets or who keeps an available job." *Humphrey v. Moore,* 375 U.S. 335, 346-347 (1964). "More than any other provi-

Union has not pleaded laches. *See Holmberg v. Armbrecht*, 327 U.S. 392 (1946).[8]

In *Franks v. Bowman Transp. Co., Inc., supra*, Mr. Justice Brennan observed:

> [O]n[e] of the central purposes of Title VII is "to make persons whole for injuries suffered on account of unlawful employment discrimination." To effectuate this "make-whole" objective, Congress in § 706(g) vested broad equitable discretion in the federal courts to "order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without backpay . . ., or any other relief as the court deems appropriate." . . . "The provisions of [Section 706(g)] are intended to give the courts wide discretion

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> sion of the collective [bargaining] agreement . . . seniority affects the economic security of the individual employee covered by its terms." Aaron, Reflections on the Legal Nature and Enforceability of Seniority Rights, 75 Harv. L. Rev. 1532, 1535 (1962). "Competitive status" seniority also often plays a broader role in modern employment systems, particularly systems operated under collective-bargaining agreements:
>
> > "Included among the benefits, options, and safeguards affected by competitive status seniority, are not only promotion and layoff, but also transfer, demotion, rest days, shift assignments, prerogative in scheduling vacation, order of layoff, possibilities of lateral transfer to avoid layoff, "bumping" possibilities in the face of layoff, order of recall, training opportunities, working conditions, length of layoff endured without reducing seniority, length of layoff recall rights will withstand, overtime opportunities, parking privileges, and, in one plant, a preferred place in the punch-out line." Stacy, 28 Vand. L. Rev., at 490 (footnotes omitted).

Id. at 766-67.

[8] The Supreme Court observed in *Holmberg v. Armbrecht*, 327 U.S. 392 (1946):

> We have the duty of federal courts, sitting as national courts throughout the country, to apply their own principles in enforcing an equitable right created by Congress. When Congress leaves to the federal courts the formulation of remedial details, it can hardly expect them to break with historic principles of equity in the enforcement of federally-created equitable rights.
>
> Traditionally and for good reasons, statutes of limitation are not controlling measures of equitable relief. Such statutes have been drawn upon by equity solely for the light they may shed in determining that which is decisive for the chancellor's intervention, namely, whether the plaintiff has inexcusably slept on his rights so as to make a decree against the defendant unfair.
>
> . . .
>
> Equity eschews mechanical rules; it depends on flexibility. . . . And so, a suit in equity may lie though a comparable cause of action at law would be barred.

Id. at 395-96.

> exercising their equitable powers to fashion the most complete relief possible. . . [*T*]*he Act is intended to make the victims of unlawful employment discrimination whole and . . . the attainment of this objective . . . requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination.*" This is emphatic confirmation that federal courts are empowered to fashion such relief as the particular circumstances of a case may require to effect restitution, making whole insofar as possible the victims of racial discrimination in hiring.

424 U.S. at 763-64 (citations and footnotes omitted) (emphasis added).

Thus we find the court erred in not granting full restitution of seniority to all plaintiffs under § 1981.

We reach the same conclusion under § 2000e et seq. The district court denied Title VII relief to all plaintiffs except Ben Allen and Aaron Rutlin, since only they had filed charges with the EEOC and the complaint did not allege a class action or seek class relief. It is settled that a suit by a named member

of a class in a class action may seek relief for the entire class without the necessity of other class members pursuing their administrative remedy with the EEOC. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414 n. 8 (1975); *Romasanta v. United Airlines, Inc.*, 537 F.2d 915, 918 (7th Cir. 1976); *Macklin v. Spector Freight Systems, Inc.*, 478 F.2d 979, 985 n. 11 (D.C. Cir. 1973); *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 719-20 (7th Cir. 1969); *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496, 499 (5th Cir. 1968). In the instant case, although no class action was filed, 13 additional plaintiffs alleged facts demonstrating they were similarly situated and had received the same discriminatory treatment as Ben Allen and Aaron Rutlin. Under such circumstances, particularly where the discrimination is continuing it would be nonsensical to require each of the plaintiffs to individually file administrative charges with the EEOC.[9] Defendants have in no way been placed in jeopardy.

In *Local 179, United Textile Wkrs. v. Federal Paper Stock Co.*, 461 F.2d 849 (8th Cir. 1972), this court held that the filing of an EEOC complaint by a union on behalf of its members satisfied the exhaustion requirement. We allowed the employees themselves to file suit. The court concluded that there had

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[9] The reasoning of Judge Bell (now Attorney General Bell) is as applicable to this situation as it is to a suit filed as a class action:

> It would be wasteful, if not vain, for numerous employees, all with the same grievance, to have to process many identical complaints with the EEOC. If it is impossible to reach a settlement with one discriminatee, what reason would there be to assume the next one would be successful.

Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 498 (5th Cir. 1968).

Aside from the practicality in allowing plaintiffs to be made whole without further administrative process, Judge Bell demonstrates the legal justification by observing:

> Racial discrimination is by definition class discrimination, and to require a multiplicity of separate, identical charges before the EEOC, filed against the same employer, as a prerequisite to relief through resort to the court would tend to frustrate our system of justice and order.

Id. at 499.

Oatis involved a class suit, but it also involved the joinder of three members of the class as co-plaintiffs. Judge Bell observed:

> [I]t is not necessary that members of the class bring a charge with the EEOC as a prerequisite to joining as co-plaintiffs in the litigation. It is sufficient that they are in a class and assert the same or some of the issues.

Id.

See also Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 719 (7th Cir. 1969).

been no attempt to bypass the EEOC, and that it was, therefore, insignificant that the union had filed the administrative charges rather than the employees themselves. This reasoning is also applicable here.

Punitive Damages.

The district court awarded each plaintiff $1,000 punitive damages. On appeal the Union urges that punitive damages do not lie under § 1981. We disagree. *See Johnson v. Railway Express Agency, Inc., supra;* and *Claiborne v. Illinois Cent. R.R.*, 401 F. Supp. 1022 (E.D. La. 1975). *See also* Comment, *Implying Punitive Damages in Employment Discrimination Cases*, 9 Harv. Civ. Lib.—Civ. Rights L. Rev. 325, 345-51 (1974).

The Supreme Court, in *Johnson*, recognized that some district courts have denied both compensatory and punitive damages in Title VII suits. However, contrary to the Union's argument here, the Supreme Court expressly observed that Title VII remedies are coextensive with the individual rights under 42 U.S.C. § 1981, and are separate, distinct and independent. Mr. Justice Blackmun observed:

> An individual who establishes a cause of action under § 1981 is entitled to both equitable and legal relief, includ-

> ing compensatory and, under certain circumstances, punitive damages. See, *e.g.*, *Caperci v. Huntoon*, 397 F.2d 799 (CA 1), cert. denied, 393 U.S. 940 (1968); *Mansell v. Saunders*, 372 F.2d 573 (CA 5 1967).

421 U.S. at 460.

The Union now urges that *Caperci* and *Mansell* were § 1983 suits, not § 1981 suits, and that the above language of *Johnson* is dictum and need not be followed. The Union further urges that no other appellate decision has allowed a punitive award in a § 1981 suit.

Section 1981 does not expressly provide a remedy for interference with the right to make and enforce contracts. In this deficiency it is like 42 U.S.C. § 1982. However, it has been determined that equitable relief and compensatory damages are available under § 1982 through 28 U.S.C. § 1343(4) and 42 U.S.C. § 1988. *See Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969); and *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). Furthermore, punitive damages have been awarded under § 1982. *See, e.g., Seaton v. Sky Realty Co.*, 491 F.2d 634 (7th Cir. 1974). Under the circumstances we see no reason for denying a punitive award under § 1981.

The Union contends that if punitive damages are allowable in a § 1981 suit, this is not an appropriate case for such an award. Again we must disagree.

In the instant case there is substantial evidence that the Union consistently obstructed plaintiffs' efforts regarding their proper seniority rights. Plaintiffs registered numerous complaints as to their disparate treatment with the defendant Union, Bi-State and various state and federal agencies. In 1969 the Union president refused to present plaintiffs' demand for seniority to the membership, although the plaintiffs requested such action. In

1971, a motion made at a Union meeting for seniority rights for plaintiffs was seconded, but not entertained because of race charges pending before city, state and federal commissions. Bi-State eventually agreed to grant plaintiffs full seniority credit for their years of work for CSC for purposes of vacation benefits, pension benefits and other future employment benefits. The Union continued its refusal to consider the seniority rights of the plaintiffs. These facts are sufficient to sustain the district court's award of punitive damages. *See, e.g., Gill v. Manuel*, 488 F.2d 799, 801 (9th Cir. 1973).[10]

Attorney Fees

The district court held that since 42 U.S.C. § 2000e et seq., was alleged as a jurisdictional base and the plaintiffs prevailed, it would award plaintiffs' attorney a fee of $300 as compensation.[11] The plaintiffs challenge the amount of the award on cross-appeal. We find the amount grossly inadequate.

The guidelines for attorney's fees set forth by the Fifth Circuit in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974), have been approved by this court. *See Doe v. Poelker*, 515 F.2d 541, 548 (8th Cir. 1975), *cert. granted*, 96 S.Ct. 3220 (1976). *See also Firefighters In-*

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[10] In *Gill v. Manuel*, 488 F.2d 799 (9th Cir. 1973), the court observed:

> The questions in regard to the credibility of the witnesses and the determination of whether the facts presented were sufficint for an award of punitive damages are issues reserved for determination by the trier of fact.

Id. at 801.

[11] The prevailing party in a Title VII action is entitled to an award of "a reasonable attorney's fee." 42 U.S.C. 2000e-5(k). The same result could be obtained under 42 U.S.C. § 1988 which allows "a reasonable attorney's fee as part of the costs" to the prevailing party, other than the United States, in suits under 42 U.S.C. §§ 1981, 1982, 1983, 1985 and 1986.

stitute for Racial Equality v. St. Louis, supra. The Senate found that those guidelines were correctly applied in *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 66 F.R.D. 483 (W.D. N.C. 1975) ($65 per hour); *Stanford Daily v. Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974) ($50 per hour); and *Davis v. County of Los Angeles*, 8 Empl. Prac. Dec. ¶ 9444 (C.D. Cal. 1974) ($84 per hour). S. Rep. No. 94-1011, 94th Cong., 2d Sess. (1976). The $4.54 per hour awarded here is obviously short of those standards.

The plaintiff also asks for attorney fees for this appeal. We have allowed such fees in *Firefighters Institute for Racial Equality v. St. Louis, supra;* and *Reed v. Arlington Hotel Co., Inc.*, 476 F.2d 721 (8th Cir.), *cert. denied*, 414 U.S. 854 (1973).

On remand the district court should reconsider the attorney fee award for the time spent prior to the filing of the notice of appeal. Additionally, we direct counsel to file an affidavit in this court as to time spent in processing the appeal in order that an allowance of reasonable attorney fees can be made for the appeal.

Conclusion

We affirm the district court's finding of racial discrimination, the awards of punitive damages and back pay,[12] and restitution of the initiation fees. We remand to the district court and direct that defendants grant plaintiffs full seniority on the Union seniority roster based upon their date of employment with CSC; that the court reconsider and award a reasonable at-

[12] Depending upon the claims of the individual plaintiffs, which now should be specifically pleaded in the district court, a master may not be needed. *See* n. 6, *supra*. It is doubtful that any factual dispute exists as to back pay, but any back pay award is, of course, limited by the five-year statute of limitations.

torney fee, and grant any other relief the court finds not inconsistent with this opinion.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT

APPENDIX II

United States Court of Appeals
For the Eighth Circuit

No. 76-1551

Ben Allen, Abraham Bracy, Aaron Rutlin, Alice Cross, Clayton R. Richardson, Frank Smith, Lee Hamlin, Elbert Miller, Mack Hamlin, Claude Riddick, Harold Smith, Earnest Harris, Chester Harris, T. C. Allen, Forest Gay,

Appellees,

vs.

Amalgamated Transit Union Local 788,

Appellant.

No. 76-1542

Ben All, Abraham Bracy, Aaron Rutlin, Alice Cross, Clayton R. Richardson, Frank Smith, Lee Hamlin, Elbert Miller, Mack Hamlin, Claude Riddick, Harold Smith, Earnest Harris, Chester Harris, T. C. Allen, Forest Gay,

Appellants,

vs.

Amalgamated Transit Union Local 788,

Appellee.

Appeals from the United States District Court for the Eastern District of Missouri.

It is hereby ordered by this Court that Ben Allen, et al., be and are hereby allowed to recover their costs and $3,000 at-

torney's fee from Amalgamated Transit Union Local 788 in these cases.

And it is further ordered by this Court that the motion of Amalgamated Transit Union Local 788 to vacate this Court's mandate and reconsider its opinion in these causes be and is hereby denied.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, 8th Circuit.

[June 23, 1977]

APPENDIX III

In the United States District Court for the
Eastern District of Missouri
Eastern Division

Ben Allen, et al.,
Plaintiffs,
vs.
Amalgamated Transit Union, Local 788,
Defendant.
No. 74-458 C (3)

Order

(Filed May 27, 1976)

In accordance with the Memorandum of this Court filed this date and incorporated herein,

It Is Hereby Ordered that the plaintiffs shall have judgment against the defendant on all Counts of plaintiffs' complaint; and

It Is Further Ordered that the defendant pay plaintiffs One Thousand Dollars ($1,000) each as punitive damages; and

It Is Further Ordered that the defendant shall reimburse each plaintiff his union initiation fee plus interest at the rate of six percent (6%) per annum from the date of payment of such initiation fee; and

It Is Further Ordered that the defendant grant plaintiffs, Ben Allen and Aaron Rutlin, their seniority date from the date of their employment with Consolidated Service Car Company, as granted to all other members of defendant Union; and

IT IS FURTHER ORDERED that the defendant grant seniority to plaintiffs, Abraham Bracy, Charles Cross, Clayton R. Richardson, Frank Smith, Lee Hamlin, Elbert Miller, Mack Hamlin, Claude Riddick, Harold Smith, Ernest Harris, Chester Harris, T. C. Allen and Forest Gay, according to a later supplemental order of this Court, after a report from a special master of this Court as discussed below; and

IT IS FURTHER ORDERED that the defendant shall pay backpay to all plaintiffs as directed by a later supplemental order of this Court after a report by a special master of this Court as discussed below; and

IT IS FURTHER ORDERED that a special master shall be appointed by the Court to hear evidence with regards to the proper seniority date of all plaintiffs except Ben Allen and Aaron Rutlin and backpay, of all plaintiffs in light of the operation of the analogous Missouri statute of limitations, § 516.120, R.S. Mo., 1969; and

IT IS FURTHER ORDERED that the parties shall report to the Court within thirty days (30) of the date of this Order as to whether or not they have found a mutually agreeable master; and

IT IS FURTHER ORDERED that upon the failure of the parties to agree upon such a master, the Court will appoint such a master after thirty days (30) from the date of this Order; and

IT IS FURTHER ORDERED that the defendant shall pay plaintiffs' attorney, Louis Gilden, an attorney's fee in the amount of Three Hundred Dollars ($300.00); and

IT IS FURTHER ORDERED that the defendant pay all costs, including those of the special master, incurred in this action; and

IT IS FURTHER ORDERED that the defendant by and is permanently enjoined from any further racial discrimination against the plaintiffs

Dated this 27th day of May, 1976.

/s/ H. Kenneth Wangelin
United States District Judge

In the United States District Court for the
Eastern District of Missouri
Eastern Division

Ben Allen, et al.,

Plaintiffs,

vs.

Amalgamated Transit Union, Local 788,

Defendant.

No. 74-458 C (3).

Memorandum

(Filed May 27, 1976)

This matter is before the Court for a decision on the merits following the trial to the Court sitting without a jury.

The plaintiffs, Ben Allen, et al., members of defendant, Amalgamated Transit Union, Local No. 788, brought this action in two Counts.

The first Count alleges illegal racial discrimination denying plaintiffs certain rights guaranteed them under the provisions of 42 U.S.C. §§ 1981 and 2000(e) et seq. It is alleged that for

reasons of race, the defendant Union failed to make a valid attempt to obtain seniority rights, and other rights incidental to seniority guaranteed to the plaintiffs under various collective bargaining agreements, and further required plaintiffs to pay an initiation fee of One Hundred Dollars ($100.00) to join the Union.

The second Count of plaintiffs' complaint alleges a denial of plaintiffs' rights guaranteed under 29 U.S.C. § 185 by the alleged acts of the defendant Union in breaching its duty of fair representation with regards to plaintiffs' seniority rights and other rights incidental to seniority. The Court being fully apprised of the premises hereby makes the following findings of fact and conclusions of law.

Findings of Fact

1. Plaintiffs are black citizens of the United States and residents of the State of Missouri and are members of defendant labor organization.

2. The defendant Union is a labor organization which acts as a collective bargaining agent for plaintiffs with the Bi-State Transit System of the St. Louis metropolitan area.

3. In 1959, a Gilman Report was prepared which recommended the merger of various transit companies in the metropolitan St. Louis area into one integrated transit system.

4. In the Gilman Report, the plaintiffs' predecessor employer, The Consolidated Service Car Company, was discussed. It was the recommendation of the Report that The Consolidated Service Car operation be purchased to eliminate competition within the transportation market.

5. The integration of the transit system into a unified whole was to be accomplished in three phases:

Phase I. Establishment of an area-wide integrated system for the metropolitan area.

Phase II. Examination of rapid transit probabilities.

Phase III. Complete the total plan by acquiring plaintiffs' predecessor employer, The Consolidated Service Car Company, and replace that operation with bus service.

6. In accordance with Phase I discussed above, the fifteen St. Louis area transit companies were merged into one corporation, the Bi-State Development Agency, commonly known as the Bi-State Transit System.

7. Transit Services Corporation became the manager of the Transit System, and handled personnel and negotiated collective bargaining agreements.

8. Of the fifteen transit companies merged into the Bi-State Transit System, thirteen had employees with union membership and two had employees without union membership.

9. Of the thirteen transit companies which had union membership, five companies had teamsters locals.

10. After the merger of the transit companies in 1963, some of the merged companies' property consisting of buses and coaches was not used due to its obsolescence.

11. All employees were trained for a period of thirty days at the time of the merger.

12. The employees of the fifteen transit companies were organized as a result of the merger into one collective bargaining unit, who is the defendant in the instant lawsuit. Substantially all of the originally merged employees are white.

13. The merged employees who were organized into the defendant were offered a waiver of initiation fee and full seniority rights for the years that they worked for their respective pre-

merger transit companies, and all members of the defendant Union were dove-tailed into one seniority list.

14. With respect to the 1963 merger of the fifteen transit companies, the defendant Union never submitted the issue of waiver of initiation fee and full credit of seniority with each transit line to the Executive Board or to the membership of the defendant Union.

15. The value of seniority for the purposes of defendant Union is:

a. A system pick (where within the entire system a person will work);

b. Division pick (which area within a particular division of the entire system a person will work);

c. Vacation time pick; and

d. Lay-off.

16. The Consolidated Service Car Company was a transit company who the plaintiffs were operators and maintenance men for prior to the purchase of the company by the Bi-State Transit System in 1965.

17. Prior to the purchase of the Service Car Company, the plaintiffs were members of Teamsters Local 688.

18. The purchase of the Service Car operation in 1965 was for the purposes of the Bi-State Transit System, an additional step in the development of a unified transit system.

19. At the time of its purchase, Consolidated Service Car Company submitted a list of operators and maintenance men and the years that each person worked for Consolidated to the Bi-State Transit System, and to which the defendant had access.

20. The Bi-State Transit System offered plaintiffs the opportunity to apply for a job as an operator or a maintenance

man, and as each of the plaintiffs entered the Union he was given a thirty day training period as an operator similar to other merged employees. The policy of the International Union is to dove-tail seniority for the years of prior employment to individuals who bring their work with them and their equipment with them.

21. As a result of the purchase of the Service Car and their removal as a transit company from the St. Louis metropolitan area, one hundred and seventy-two additional, daily, round trips, along with new buses were added by the Bi-State Transit System.

22. The above finding of fact clearly indicates that the plaintiffs brought their work and their equipment with them when the Consolidated Service Car Company was merged into the Bi-State Transit System.

23. The Union Executive Board passed a motion after the purchase of the Consolidated Service Car Company to require the Consolidated Service Car operators to pay an initiation fee upon entry into the defendant Union.

24. The plaintiffs did in fact pay such an initiation fee, and did not receive seniority credit for their years of service with Consolidated Service Car Company from either Bi-State Transit System or defendant Union.

25. At the time of the plaintiffs' acceptance as employees by Bi-State Transit System, and at the time of their membership with the defendant Union, there was in existence a collective bargaining agreement which contained the following provision:

> Seniority of each of the full-time operators covered by this Agreement shall be on a system basis. The years of service of each of the full-time operators with each of their predecessor transit companies shall be counted from

> the date of last employment and be given full credit in the seniority roster.

26. The Court finds that the Consolidated Service Car Company was clearly a predecessor transit company even though the purchase took place approximately two years after the merger of fifteen other transit companies.

27. All of the plaintiffs entered the defendant Union on the bottom of the seniority list.

28. Plaintiffs complained in 1968 to various Union officials concerning the denial of their seniority rights, and continued to object to the seniority practices in later years.

29. A motion was made at a Union meeting for seniority rights for the plaintiffs. This motion was refused by the president of defendant Union, due to racial discrimination charges pending at that time.

30. As a result of the actions of defendant Union, the plaintiffs complained to the N.A.A.C.P. and to the Missouri Commission on Human Rights alleging discrimination on the part of the Bi-State Transit System and the Union.

31. Officers of the defendant Union continued to refuse to present the plaintiffs' request for seniority to the Union membership, and in addition stating that they would not recommend the action desired by the plaintiffs.

32. The plaintiffs met with the N.A.A.C.P., Bi-State Transit officials, and the President of defendant Union in 1969. As a result of that meeting, Bi-State Transit agreed to grant the plaintiffs full seniority credit for the years of work for Consolidated Service Car Company for the purposes of (a) vacation benefits, (b) pension benefits and (c) for any other future employment benefits.

33. At the 1969 meeting the President of defendant Union refused to consider any seniority rights changes for the plaintiffs.

34. At a later time, a conciliation agreement was entered into between the Missouri Commission on Human Rights, plaintiffs and the Bi-State Transit System in which the plaintiffs were granted vacation pay due them as if their service time as service car operators had been originally credited to them upon their employment by the Bi-State System.

35. Further, the Bi-State System stated in the conciliation agreement:

> Respondent, (Bi-State) will in no way obstruct or impede the dove-tailing of complainants' seniority with that of other drivers on the seniority roster of the Amalgamated Transit Union Local 788.

36. The plaintiffs have been granted full seniority benefits by Bi-State consistent with the applicable collective bargaining agreements.

37. The defendant Union has presented as an alleged defense that there might be morale problems among the Membership if plaintiffs were advanced in seniority over other employees, both white and black.

38. After careful consideration of all the evidence adduced, it is the opinion of the Court that the defendant has asserted no necessity of a business nature for its conduct with regard to the plaintiffs.

Since the plaintiffs were the only merged employees treated in this fashion by the defendant Union, and the merged employees of the Consolidated Car Company were predominantly black, the Court is left with the inescapable conclusion that the actions of the defendant were based upon race.

Conclusions of Law

This Court has jurisdiction over the parties pursuant to 42 U.S.C. § 2000e-5(f), 42 U.S.C. § 1981 and 29 U.S.C. § 185.

As the Court stated in its findings of fact, it is clear that the plaintiffs have been discriminated against solely on the basis of race. The chief problem before the Court is the granting of relief due to certain problems dealing with the various statutes of limitations involved.

The defendant has asserted that the action of the plaintiffs is barred by the operation of statutes of limitations particularly with regard to 42 U.S.C., § 1981, and 29 U.S.C. § 185. It must be noted, however, that the plaintiffs have alleged continuing discrimination from 1965 to the present date. In such a situation of continuing discrimination, which the evidence adduced at trial clearly indicates exists, the appropriate statute of limitations merely operates to bar the period of retroactive relief available to the plaintiffs. *Jamison v. Olga Coal Company*, 335 F. Supp. 454 (S.D. W.Va., 1971).

Since 42 U.S.C. § 1981 and 29 U.S.C. § 1985 contain no specific statute of limitations, any limitation period must be derived from the most closely analogous state statute of limitations. With regard to both 42 U.S.C. § 1981 and 29 U.S.C. § 185, it is the opinion of the Court that the proper analogous state statute is the five year Missouri statute of limitations for breach of written contracts, namely, § 516.120, R.S. Mo., 1969. *Johnson v. Railway Express Agency*, — U.S. —, 10 F.E.P. Cases, 817, 820 (1975); *Butler v. Local No. 823, Int. Bro. of Teamsters, etc.*, 514 F.2d 442 (8th Cir., 1975); and *Wright v. Stone Container Corp.*, 386 F.Supp. 890 (E.D. Mo., 1974).

With regards to the granting of seniority rights, as stated above, it is clear that the operation of the analogous State

statute, here § 516.120, R.S. Mo., 1969, operates to bar relief to all plaintiffs except Ben Allen and Aaron Rutlin from any relief prior to five years from the date of filing this action (July 5, 1974). *Jamison v. Olga Coal Company*, supra, at 463. Accordingly, as stated in the Order of this Court accompanying this Memorandum, the determination of relief with regard to seniority for all plaintiffs except Ben Allen and Aaron Rutlin will be withheld until a report of this Court's master is prepared.

Since plaintiffs, Ben Allen and Aaron Rutlin, have also alleged jurisdiction under the provisions of 42 U.S.C. § 2000e et seq., and have complied with all jurisdictional prerequisites of that statute, their rights with regard to seniority provisions of the collective bargaining agreement are not governed by a five year period. *Franks v. Bowman Transportation Co., Inc.*, — U.S. —, 44 U.S. L.W. 4356, (Mar. 24, 1976). Therefore, the Court will order that plaintiffs, Ben Allen and Aaron Rutlin, be granted their seniority rights in accordance with the procedures utilized for all other pre-merger employees. Since plaintiffs, Allen and Rutlin, have also alleged a cause of action under 42 U.S.C. § 1981, their claim for backpay shall be computed according to the analogous statute of limitations, § 516.120, R.S. Mo., 1969, as discussed above in regard to the other plaintiffs in this action.

After careful consideration of the evidence adduced at trial, it is the opinion of this Court that the instant lawsuit is one where punitive damages under § 42 U.S.C. § 1981 are warranted, *Johnson v. Railway Express*, supra, 10 F.E.P. Cases at 819. It is clear that the plaintiffs' employer, the Bi-State Transit System, has attempted to remedy the discrimination against the plaintiffs, while the defendant has consistently sought to obstruct the plaintiffs from receiving their proper seniority and other employment benefits. The granting of One Thousand ($1,000) in punitive damages to each plaintiff is well warranted in the opinion of this Court.

Since 42 U.S.C. § 2000e et seq. has been alleged as a jurisdictional base for this action, and the plaintiffs have prevailed, this Court, after considering the evidence, will award plaintiffs' attorney a fee of Three Hundred Dollars ($300.00) as compensation.

In conclusion, it is the opinion of the Court after careful consideration of all the evidence, along with parties' post-trial memoranda, that the plaintiffs have clearly proven a case of race discrimination, and are entitled to the relief as stated in the order accompanying this Memorandum.

Dated this 27th day of May, 1976.

/s/ H. KENNETH WANGELIN
H. KENNETH WANGELIN
United States District Judge

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-208

AMALGAMATED TRANSIT UNION, LOCAL 788,
Petitioner,

v.

BEN ALLEN, et al.,
Respondents.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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Cases Cited

Statutory Provisions Cited

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

INTRODUCTION

Petitioner files this Supplemental Brief, pursuant to Rule 24, to call attention to a new decision unavailable to Petitioner at the time it filed its Petition for a Writ of Certiorari on August 6, 1977. On July 15, 1977, the United States Court of Appeals for the Eighth Circuit issued its opinion in *DeGraffenreid v. General Motors Assembly Division, St. Louis*, — F.2d —, 14 EPD ¶ 7692 (No. 76-1599, 8th Cir. 1977). This opinion directly supports Petitioner's position before this Court. Peti-

tioner therefore respectfully requests that the Court consider *DeGraffenreid, supra,* as additional authority in support of Petitioner's argument and reasons relied on for allowing this Writ.

As previously noted, the Eighth Circuit Court of Appeals decided the case at bar before the decision of this Court in *United Air Lines, Inc. v. Evans,* No. 76-333, 45 U.S.L.W. 4566, announced on May 31, 1977. By that date, Petitioner could not file a timely motion for rehearing before the Court of Appeals. Instead, Petitioner filed Suggestions to Reconsider based on *Evans, supra.* These Suggestions were denied without explanation by the Court of Appeals (See Appendix II of Petition for a Writ of Certiorari). Since the Court of Appeals, without explanation, denied Petitioner's request to reconsider its opinion, it is reasonable to assume that such action was based merely upon the expiration of time for filing a motion for rehearing. This interpretation is particularly warranted in view of the holding in *DeGraffenreid,* which clearly comports with this Court's decision in *Evans,* and is manifestly inconsistent with the decision of the Court of Appeals in the instant case. The application of the Eighth Circuit's reasoning in *DeGraffenreid* to this case provides additional authority for Petitioner's position that the decision below should be vacated and summarily reversed.

SUPPLEMENTAL ARGUMENT

The Court of Appeals in *DeGraffenreid* applied the holding by this Court in *Evans,* in a manner totally consistent with Petitioner's previous arguments before this Court. The decision below in the instant case, based upon the now rejected reasoning in *Evans v. United Air Lines, Inc.,* 534 F.2d 1247 (7th Cir. 1976), which was reversed by this Court, cannot stand.

In *DeGraffenreid,* several black females sought relief under Title 42, U.S.C. Section 1981 and Title 42 U.S.C. Section 2000e et seq. by way of retroactive seniority benefits. Specifically, plaintiffs alleged that defendant's discriminatory hiring practices in 1965, 1966 and 1967 precluded plaintiffs from gaining seniority credit to which they were purportedly due. Subsequently, all plaintiffs were hired by defendant and then laid off. In analyzing these facts, the Eighth Circuit correctly applied this Court's reasoning in *Evans,* as illustrated by the following language in *DeGraffenreid*:

> The appellants, however, failed to file any complaint with the EEOC until August 28, 1974, at least seven years after the alleged initial discriminatory hiring practices, at least one year after General Motors hired the last of the appellants, thus ending any discrimination in hiring against them, and more than six months after the mid-January 1974 layoffs. Clearly, under *Evans,* appellants' Title VII claims are barred for failure to file charges within the pre-1972 ninety-day limitations period or within the current one hundred eighty-day limitations period beginning on the last day that GM discriminated against appellants in hiring.

In the present case Petitioner has repeatedly argued that unlawful action, if any, occurred in 1965 or 1966 when Respondents became members of the Petitioner Union. At that point in time, Respondents knew for a certainty that they would not be

granted seniority credit by the Union based upon their prior service with their previous employer. Therefore, Respondents' Title VII charges filed five (5) years thereafter, and their Section 1981 suit filed at least eight (8) years later, were untimely. The Court in *DeGraffenreid*, squarely confronted this issue by stating:

> Thus, when appellants failed to file charges with the EEOC within one hundred and eighty days following their *entry into service*, GM was entitled to consider its earlier failure to hire appellants as lawful, a mere "unfortunate event in history which has no present legal consequences." United Air Lines, Inc. v. Evans . . . and measure appellants' seniority from their actual dates of hire. (Emphasis supplied)

Petitioner asserts that it is clear from the foregoing language that the Eighth Circuit Court of Appeals has applied this Court's decision in *Evans* in a manner which would have barred Respondents' claims in the present case had it been decided after *Evans*. In effect, the Court of Appeals has now applied *Evans* in the precise manner asserted by Petitioner in its Petition to this Court. Therefore, the decision in this case, rendered before the *Evans* opinion, is squarely inconsistent with this Court's holding in *Evans*. That holding is equally as controlling here, as it was in *DeGraffenreid*, as illustrated by the following language quoted from *Evans*, by the Court of Appeals:

> Respondent is correct in pointing out that the seniority system gives present effect to a past act of discrimination. But United was entitled to treat that past act as lawful after respondent failed to file a charge of discrimination within the 90 days then allowed by § 706(d). *A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed.* (Emphasis supplied)

Therefore, Petitioner respectfully submits that this Writ should be granted to assure consistent application of this Court's ruling in *Evans*, and to resolve the inconsistency within the Eighth Circuit Court of Appeals between this instant earlier case and the subsequent decision in *DeGraffenreid*.

CONCLUSION

For the additional reasons stated above, this Petition for Writ of Certiorari should be granted, and the decision of the Court of Appeals vacated and summarily reversed.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-208

AMALGAMATED TRANSIT UNION, LOCAL 788,
Petitioner,

v.

BEN ALLEN, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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OPINIONS BELOW

The opinion of the District Court is reported at 415 F.Supp. 662 (E.D.Mo. 1976). The opinion of the Court of Appeals is reported at 554 F.2d 876 (8th Cir. 1977).

JURISDICTION

The opinion of the Court of Appeals was filed on May 9, 1977 (App.[1] I, p. A-1). Petitioner filed Suggestions for Reconsideration of the Court's opinion based on *United Air Lines, Inc. v. Evans*, — U.S. —, 52 L.Ed.2d 571 (1977), on June 8, 1977. This was denied by the Court of Appeals on June 23, 1977 (App. II, p. A-18).

On August 2, 1977, this Court extended the time for filing the Petition for Writ of Certiorari until September 6, 1977. On August 11, 1977, this Court extended the time to file a response to the Petition for Writ of Certiorari to and including September 22, 1977.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED FOR REVIEW

Whether petitioner's disparate application of a provision of the collective bargaining agreement to the detriment of the black respondents is a current and present violation of Title VII of the Civil Rights Act of 1964 and 42 U.S.C. §1981.

STATUTES INVOLVED

U.S.C., Title 42, Section 1981
Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and

[1] App. is Appendix to Petition for Writ of Certiorari filed by Petitioner.

enforce contracts, to sue, be parties, give evidence and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

U.S.C., Title 42, Section 2000e-2(c)
Labor organization practices

It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

U.S.C. Title 42, Section 2000e-5(f)(1)

Civil action by . . . person aggrieved; . . . . .

. . . . within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved . . .

Revised Statutes of Missouri, Section 516.120
What Actions Within Five Years

Within five years:

(1) All actions upon contracts, obligations or liabilities, express or implied, except those mentioned in section 516.110, and except upon judgments or decrees of a court of record, and except where a different time is herein limited;

(2) An action upon a liability created by a statute other than a penalty or forfeiture;

(3) An action for trespass on real estate;

(4) An action for taking, detaining or injuring any goods or chattels, including actions for the recovery of specific personal property, or for any other injury to the person or rights of another, not arsing on contract and not herein otherwise enumerated;

(5) An action for relief on the ground of fraud, the cause of action in such case to be deemed not to have accrued until the discovery by the aggrieved party, at any time within ten years, of the facts constituting the fraud. (R.S. 1939, § 1014)

STATEMENT OF THE CASE

The collective bargaining agreement between petitioner, Union, and Bi-State Development Agency, the employer, for the period of June 1, 1973, to August 31, 1975, contained the following provision:

> Seniority of each of the full-time operators covered by this Agreement shall be on a system basis. The years of service of each of the full-time operators with each of their predecessor transit companies shall be counted from date of last

> employment and given full credit in the seniority roster. (App. I, p. A-4; Appendix III, pps. A-26, 27).[2]

Petitioner Union granted the substantially white transit operators full credit in the seniority roster for their years of service with their predecessor transit company (App. III, p. A-24).

However, the black respondents who had worked for the Consolidated Service Car Company[3] received no credit from Petitioner in the seniority roster for their years of service with their predecessor transit company (App. I, p. A-4; App. III, p. A-26), while by contrast, Bi-State Development Agency, the employer, had granted respondents full seniority credit for company purposes for their years of prior service with CSC (App. I, p. A-5; App. III, p. A-28).

The Appeals Court found that there is substantial evidence that the Union consistently blocked respondents' efforts regarding their proper seniority rights[4] (App. I, p. A-14).

Both the District Court and the Appeals Court found that petitioner has no justifiable reason for not applying the collective bargaining provision to respondents (App. I, p. A-6; App. III, p. A-28).

The Appeals Court sustained the finding of racial discrimination on the part of petitioner made by the District Court under

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[2] Plaintiff's Exhibit 7.

[3] Hereinafter referred to as CSC.

[4] The Union president told respondents that the matter of their seniority would have to be put to a vote before the "rank and file" Union membership; however, he refused to place the matter before the rank and file because the action might cost him his office at the next election. Later, a motion was made and seconded at a full Union meeting for full seniority rights for the former CSC employees; however, it was not entertained because charges had been filed by respondents before the City, State and Federal Commissions (App. I, p. A-5).

both Title VII and 42 U.S.C. § 1981,[5] and found disparate treatment between the white and black members of the Union. Both Courts held that the black respondents are unable to enfroce the provision in the collective bargaining agreement for full credit in the seniority roster for their years of service with CSC, which their white counterparts were able to enforce with petitioner, and in which the white transit workers obtained full credit in the seniority roster from the Union for their years of service with their predecessor transit companies (App. I, pps. A-7, 11; App. III, p. A-29).

Both Courts also found that the disparate treatment is intentional race discrimination, and the circumstances warrant the payment of punitive damages to respondents under 42 U.S.C. § 1981 (App. I, p. A-15; App. III, p. A-30).

Two of the respondents had filed their charges with the E.E.O.C. in March, 1971. The E.E.O.C. issued a reasonable cause determination on August 21, 1972 that petitioner violated Title VII, and these two respondents were issued their Notices of Right to Sue Within 90 Days on June 13, 1974. This action was brought by the 15 respondents against the Union on July 5, 1974 (App. I, pps. A-4, 5).

After the Appeals Court filed its opinion, petitioner filed Suggestions with the Appeals Court to reconsider its opinion based on this Court's opinion in *United Air Lines, Inc. v. Evans, supra.* The Appeals Court denied this Motion (App. II, pps. A-18, 19.

The issue before this Court is whether this action was timely brought on July 5, 1974, based on 42 U.S.C. § 1981 and § 2000e *et seq.*, at a time when petitioner was currently and presently violating the law by disparate treatment of the black

[5] A second count alleging that the Union had breached its duty of fair representation under 29 U.S.C. § 185 was an issue not passed on by the Appeals Court since they granted relief under 42 U.S.C. § 1981 and § 2000e *et seq.* (App. I, p. A-2).

respondents in the enforcement of a provision of a collective bargaining agreement that covered the period from June 1, 1973, to August 3, 1975.

It is conceded that there is a five year Statute of Limitations in Missouri for the commencement of an action under 42 U.S.C. § 1981, Mo.Rev.Stat. § 516.120 (1969) (Brief Pet. p. 6; App. I, p. A-7; App. III, p. A-29).

REASONS FOR DENYING THE WRIT

Both the District Court and the Appeals Court found a present and current violation of 42 U.S.C. § 1981 and § 2000e *et seq.* when they held that petitioner intentially discriminates against respondents by reason of race in its disparate treatment between the white members of the Union and the black members (respondents).[6] This is demonstrated by the respondents' inability to enforce a provision of the collective bargaining agreement which their white counterparts were able to enforce.[7]

Since there has been a finding of a present violation of the Statutes by petitioner, the criteria of *United Air Lines, Inc. v. Evans, supra* at p. 578 has been satisfied.[8]

In *Evans*, this Court stated that Evans had not alleged that United's administration of the seniority system had violated the

[6] In *International Brotherhood of Teamsters v. United States*, — U.S. —, 52 L.Ed.2d 396, 415, n. 15 (1977) this Court stated that disparate treatment is the most easily understood type of discrimination.

[7] The District Court found that the following provision existed in the collective bargaining agreement *at the time of their membership* with the Union (App. III, pps. A-26, 27):

> Seniority of each of the full-time operators covered by this Agreement shall be on a system basis. The years of service of each of the full-time operators with each of their predecessor transit companies shall be counted from date of last employment and given full credit in the seniority roster. (Plaintiff's Exhibit 7; Agreement covering period from June 1, 1973, to August 3, 1975).

and the Appeals Court held:

> [t]he evidence supports a finding that the black plaintiffs were unable to enforce a provision of the collective bargaining agreement which their white counterparts were able to enforce. We accordingly affirm the district court's finding of racial discrimination. (App. I, p. A-7).

[8] The Appeals Court was requested by Petitioner to reconsider its opinion based on *United Airlines, Inc. v. Evans, supra*, and this request was denied by the Court.
See also, *Clark v. Olinkraft, Inc.*, 556 F.2d 1219 (5th Cir. 1977).

collective bargaining agreement covering her employment, and had not alleged that United's seniority system differentiates between similarly situated males and females on the basis of sex (52 L.Ed.2d at p. 577, 578); however, by contrast, here respondents have alleged, and the District and Appeals Courts have found, that the Union's administration of the seniority system currently and presently violates the collective bargaining agreement covering their employment, and that petitioner's administration of the seniority system differentiates between similarly situated blacks and whites solely on the basis of race.[9]

Thus, this action was timely filed by respondents.[10]

CONCLUSION

Since respondents have shown a present and current violation of the law, the Petition for a Writ of Certiorari should be denied, and this Court should refuse to vacate and summarily reverse the decision of the Court of Appeals.

Respectfully submitted,

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[9] The white transit workers were given full credit by the petitioner in the seniority roster for their years of service with each of their predecessor transit companies, while the black respondents were given no credit by petitioner for their service with their predecessor transit companies. By contrast, the employer, Bi-State Development Agency, had given the respondents full seniority credit for company purposes (App. I, p. A-5).

[10] Mo. Rev. Stat. § 516.120 (1969), 42 U.S.C. § 2000e-5(f)(1).